

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

THE UNITED STATES for the use of)
GMW Fire Protection, Inc., an Alaska)
Corporation,)

Plaintiff,)

vs.)

KANAG'IQ CONSTRUCTION CO.,)
INC., an Alaska Corporation, and)
WESTERN SURETY COMPANY, a)
South Dakota Corporation,)

Defendants.)

Case No. A05-170 CI (TMB)

REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO STRIKE

Defendants, KANAG'IQ CONSTRUCTION CO., INC. and WESTERN SURETY COMPANY, through their counsel, Eide & Gingras, P.C., reply to Plaintiff's Opposition to Motion to Strike. As a preliminary matter, the settlement proposal at issue makes clear on its face that it was intended as a confidential settlement proposal: "As a settlement offer, it is not admissible in evidence for *any* purpose." [Plaintiff's Exhibit A; emphasis added] GMW completely fails to address this issue in its opposition. GMW's effort to admit the letter into evidence at all is inappropriate and unsupported under the circumstances.

Moreover, Federal Rule of Evidence 408 prohibits the use of offers to compromise when offered to prove the invalidity or amount of a claim that was disputed as to validity or amount. Fed. R. Evid. 408(a)(2). This, however, is precisely what GMW is doing.

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1 By its own admission, GMW states: “The letter was offered to show that Kanag’Iq used
2 unreasonable counterclaims to avoid paying GMW’s legitimate claims. . . .” [Opposition,
3 p. 2] Rule 408 prohibits this: in offering the letter, GMW attempts to show that
4 Kanag’Iq’s counterclaims were invalid (unreasonable), and that its claims were valid
5 (legitimate) for purposes of an award of attorney’s fees.

6 Even if evidence of settlement negotiations may sometimes be relied upon in setting
7 a reasonable fee award, GMW mischaracterizes the evidence here:

8 . . . [T]he obvious intent and purpose of [Kanag’Iq’s] unfair trade practices
9 claim was to threaten GMW with the treble damages provisions in order to
10 encourage GMW to drop its legitimate claims, as was evidenced by the fact
11 that Kanag’Iq’s only settlement offers, throughout, were that GMW pay
12 Kanag’Iq [See Exhibit A] or that the parties “walk away.”

13 [Plaintiff’s Reply to Response to Supplemental Briefing Re Attorney Fees, p. 2] First,
14 Kanag’Iq did not bring any of the counterclaims to “threaten” GMW, and the Court stated
15 at oral argument that the counterclaims were not frivolous. Second, Exhibit A and GMW’s
16 reference above to other settlement offers by Kanag’Iq, also inadmissible, do not provide
17 evidence of threat as GMW alleges. There is no logical connection between the settlement
18 offer(s) and GMW’s mischaracterization of the claims and counterclaims. The parties
19 simply differed in their views of the case, which is why it went to trial.

20 GMW’s use of the letter in this matter is not permissible in light of the letter’s
21 express confidentiality provision, GMW’s stated reason for offering the evidence, and
22 Rule 408. GMW’s submission is not permitted under the rule. Moreover, courts do not
23 necessarily deem the consideration of settlement negotiations proper to establish an award
24
25

1 of attorney's fees. See Fair Housing Council of San Diego v. Penasquitos Casablanca
2 Owner's Assoc., 523 F.Supp.2d 1164, 1175 (S.D.Cal. 2007) (the court declined to consider
3 settlement related communications in reaching its decision regarding attorney's fees).
4 Kanag'Iq respectfully requests the Court to strike any part of GMW's opposition that
5 references settlement negotiations, including Exhibit A, and to impose whatever sanctions
6 it deems appropriate.
7

8 DATED at Anchorage, Alaska this 29th day of May, 2008.

9 EIDE & GINGRAS, P.C.
10 Attorneys for Defendants
11 Kanag'Iq Construction Co., Inc. and
Western Surety Company

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17 CERTIFICATE OF SERVICE

18 I am a legal secretary employed by the law
19 firm of Eide & Gingras, P.C. That on this
20 29th day of May, 2008, I served

[x] Electronically

21 a true and accurate copy of the foregoing
22 document upon the following counsel of record:

23 Sarah J. Tugman, Esq.
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EIDE & GINGRAS, P.C.

By: /s/Donna Charter

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